

15-1251 NLRB V. SW GENERAL, INC.

DECISION BELOW: 796 F.3d 67

LOWER COURT CASE NUMBER: 14-1107, 14-1121

QUESTION PRESENTED:

Many important government posts must be filled by persons who are nominated by the President and confirmed by the Senate. The Federal Vacancies Reform Act of 1998 (FVRA), 5 U.S.C. 3345 *et seq.*, provides that when such an office is vacant, its functions and duties may be performed temporarily in an acting capacity by either the first assistant to the vacant post, under Section 3345(a)(1); a Senate-confirmed official occupying another office in the Executive Branch who is designated by the President under Section 3345(a)(2); or a senior official in the same agency designated by the President under Section 3345(a)(3).

Section 3345(b) of the FVRA provides as a general rule that "[n]otwithstanding subsection (a)(1)," a person who is nominated to fill a vacant office that is subject to the FVRA may not perform the office's functions and duties in an acting capacity unless the person served as first assistant to the vacant office for at least 90 days in the year preceding the vacancy. 5 U.S.C. 3345(b).

The question presented is whether the precondition in 5 U.S.C. 3345(b)(1) on service in an acting capacity by a person nominated by the President to fill the office on a permanent basis applies only to first assistants who take office under Subsection (a)(1) of 5 U.S.C. 3345, or whether it also limits acting service by officials who assume acting responsibilities under Subsections (a)(2) and (a)(3).

CERT. GRANTED 6/20/2016